Supreme Court, U.S.
FILED
JUL 15 1999
OFFICE OF THE CLERK

No. 98-1894

In The

# Supreme Court of the United States

PEGGY ANN BUCKLEY,

*Petitioner,*

v.

CALIFORNIA COASTAL COMMISSION,

*Respondent.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two**

## SUPPLEMENTAL BRIEF

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## THE WISCONSIN SUPREME COURT HAS RECENTLY ISSUED AN OPINION IN CONFLICT WITH THE ONE BELOW. WISCONSIN EXPRESSLY DECLINED TO ADOPT CALIFORNIA'S VIEW BECAUSE IT RECOGNIZED THAT CALIFORNIA'S VIEW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT.

As of July 7, 1999, California and Wisconsin are in conflict on the substantive issues raised in Mrs. Buckley's Petition for Certiorari. She therefore files this Supplemental Brief pursuant to Rule 15.8, to apprise this Court of the recent Wisconsin decision.

The case is *Eberle v. Dane County Bd. of Adjustment*, ___ N.W.2d ___, 1999 WL 457727 (July 7, 1999). The central fact is that Mr. and Mrs. Eberle were denied a permit which, in turn, deprived them of access to their property. That permit denial was legally invalid and was overturned by the Wisconsin courts. However, as here, after holding that the government's action was illegal, the lower Wisconsin courts held that no taking occurred and dismissed the claims for compensation.

The basis for dismissing the compensation claims was the earlier decision in *Reel Enterprises v. City of LaCrosse*, 146 Wis.2d 662, 431 N.W.2d 743 (Wis. App. 1988), *rev. den.* 147 Wis.2d 887, 436 N.W.2d 29 (1988), in which the court of appeals declared that an invalid regulatory act cannot be a taking within the meaning of the constitution – just as California's decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006 (1998) held that "mistaken" governmental actions cannot be takings, even if they deny the landowner all productive use during the litigation over the regulatory act's invalidity.

The Wisconsin Supreme Court overruled *Reel*:

" . . . to the extent that Reel holds that no taking can result when a court reverses a decision of a governmental entity, Reel is incongruent with precedent of this court and the United States Supreme Court.

* * *

"The court in Reel cited no authority in support of its novel rule that reversal of an agency action by a court converts an action which otherwise might have been actionable as a taking into one which is not, and our research did not uncover any.

* * *

"More importantly, however, the Reel court's exclusion of actions reversed by courts from the pool of actions which might qualify as unconstitutional temporary takings is contrary to . . . the United States Supreme Court's decisions in First English [Evangelical Lutheran Church v. County of Los Angeles, 483 U.S. 304 (1987)] and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

* * *

"The Reel rule runs counter to these settled rules of law. . . . Under Reel, . . . the effect of the court's decision is to convert the taking, after the fact, into something which was not a taking, and thereby wipe out the landowner's ability to recover any just compensation.

"As such a result is not consistent with the law of takings established in cases of this court and the United States Supreme Court, we must

> overrule this holding in Reel." (Westlaw op., pp. 6, 7)

In their briefing, the Wisconsin regulators had urged the court "to adopt the reasoning of the [California] majority in Landgate . . . , that when an agency's erroneous action is reversed by a court, there is no taking, because such delay is just a part of the process of developing property." (Westlaw op., p. 13, fn. 25.) The Wisconsin Supreme Court, however, found *Landgate* unpersuasive, noting pointedly that "the argument of the majority in Landgate was clearly considered and rejected by the United States Supreme Court in First English. . . . " (Westlaw op., p. 13, fn. 25.)

Thus, the Wisconsin Supreme Court has joined the California dissenters in unmasking the California position for what it is: undeniably in conflict with the central takings decisions handed down by this Court in recent years. Moreover, Wisconsin's position now directly conflicts with California's, making the rights of California's residents something less than those enjoyed by their brothers and sisters in Wisconsin.

In light of this recent decision, the need for this Court's intervention is all the more evident. The confusion injected into 5th Amendment takings law by the California courts will continue to raise conflicts with other state courts of last resort, as well as with this Court. Mrs. Buckley therefore prays that Certiorari be granted

and California's law be aligned with this Court's paramount decisions.

Respectfully submitted,

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